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Preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery

Submitted by the Special Rapporteur

Summary

At its eighth session in May 2009, the Permanent Forum on Indigenous Issues decided to appoint as Special Rapporteur Tonya Gonnella Frichner, a member of the Permanent Forum, to conduct a preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery, which has served as the foundation of the violation of their human rights, and to report thereon to the Forum at its ninth session.

This preliminary study establishes that the Doctrine of Discovery has been institutionalized in law and policy, on national and international levels, and lies at the root of the violations of indigenous peoples' human rights, both individual and collective. This has resulted in State claims to and the mass appropriation of the lands, territories and resources of indigenous peoples. Both the Doctrine of Discovery and a holistic structure that we term the Framework of Dominance have resulted in centuries of virtually unlimited resource extraction from the traditional territories of indigenous peoples. This, in turn, has resulted in the dispossession and impoverishment of indigenous peoples, and the host of problems that they face today on a daily basis.

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Given that United States of America federal Indian law is most accessible to the Special Rapporteur, and because it serves as an ideal example of the application of the Doctrine of Discovery to indigenous peoples, this preliminary study provides a detailed examination of the premise of that system as found in the United States Supreme Court ruling *Johnson's Lessee v. McIntosh*. Evidence is then provided demonstrating that the Doctrine of Discovery continues to be treated as valid by the United States Government.

The Special Rapporteur concludes by recommending that an international expert group meeting be convened to discuss in detail the findings and implications of this preliminary study of the Doctrine of Discovery, and present its findings to the Permanent Forum at its annual session. Further study and review will be needed to ascertain to what extent and how the Doctrine of Discovery and the Framework of Dominance are applied to indigenous peoples throughout the world.

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> We maintain, that the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to assume sovereignty over, and to govern the unconverted natives of Africa, Asia, and North and South America, has been recognized as a part of the national law [Law of Nations], for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial.[1]

I. Introduction

1. The Permanent Forum on Indigenous Issues has a mandate to discuss issues related to indigenous economic and social development, culture, the environment, education, health and human rights. This preliminary study will examine the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery, which has served as the foundation of the violation of their human rights.

2. Part of the objective of this preliminary study is to draw attention to differences in world view between indigenous peoples and State actors, with the understanding that focusing on those differences will be conducive to further dialogue and clearer communication between them.

3. The United Nations Declaration on the Rights of Indigenous Peoples (General Assembly resolution 61/295, annex) is the product of efforts spanning three decades. The Declaration addresses human rights grievances and other concerns that indigenous peoples' representatives have brought to the international arena since the early 1900s, during the days of the League of Nations. The adoption of the Declaration presents the opportunity to clearly identify what lies at the root of those grievances and concerns, namely, the historic tendency of State actors to assert a sovereign dominant authority over indigenous peoples, based on claims to and assertions of ultimate or superior title to indigenous peoples' lands, territories and resources. This paper demonstrates that the Doctrine of Discovery lies at the root of such claims and assertions of dominance by States.

[1] Judge John Catron for the Supreme Court of Tennessee in the case *State v. Foreman* 16 Tenn. (8 Yerg.) 256, 277 (1835). For a further discussion of how Judge Catron's ruling pertains to this preliminary study, see paras. 5-17 below.

II. Future work on the global scope of the Doctrine of Discovery

4. The extent to which the Doctrine of Discovery and the Framework of Dominance[2] have been applied in case law and policy in Africa, Asia, Central and South America will need to be thoroughly investigated and addressed as a follow-up to this preliminary study. As countries that emerged from the imperial and colonial history of the British crown, Australia, Canada and New Zealand will also need to be made part of any future study. We fully recognize and appreciate that our indigenous brothers and sisters are dealing with the impacts of the Doctrine of Discovery and the Framework of Dominance in their geographical regions. However, given the limited constraints of a preliminary study, our focus has been primarily on United States federal Indian law. This preliminary study is intended to serve as a model that sets forth a direction for future research in other regions of the world. Future study will be required to address the seven official regions identified by the Permanent Forum. United States federal Indian law, which has been referenced in case law in other countries of the world,[3] is treated in this preliminary study as a prototypical example of the application of the Doctrine of Discovery and the dominance framework.

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[2] The Old World idea of property was well expressed by the Latin *dominium*: from *dominus* which derived from the Sanskrit *domanus* (he who subdues). *Dominus* in the Latin carries the same principal meaning (one who has subdued), extending naturally to signify "master, possessor, lord, proprietor, owner". *Dominium* takes from *dominus* the sense of "absolute ownership" with a special legal meaning of property right of ownership (see Lewis and Short, *A Latin Dictionary* (1969 ed.)). *Dominatio* extends the word into "rule, dominium, and ... with an odious secondary meaning, unrestricted power, absolute dominium, lordship, tyranny, despotism. Political power grown from property — dominium — was, in effect, domination" (William Brandon, *New Worlds for Old* (1986)). In this preliminary study, "Framework of Dominance" and "dominance framework" are both used in this latter sense. State claims and assertions of "dominion" and "sovereignty over" indigenous peoples and their lands, territories and resources trace to these dire meanings, handed down from the days of the Roman Empire, and to a history of the dehumanization of indigenous peoples. This is at the root of indigenous peoples' human rights issues today.

[3] In *Conquest by Law*, Professor Lindsay Robertson states that the reach of the *Johnson v. McIntosh* decision "has been global". He continues: "In its 1984 decision in *Guerin v. The Queen*, for example, the Supreme Court of Canada, after citing *Johnson*, held that 'Indians have a legal right to occupy and possess certain lands, the ultimate fee to which is in the Crown'. Under Canadian law, as under U.S. law, the tribes lost ownership of their lands by virtue of discovery". Robertson then mentions that the High Court of Australia cited *Johnson* in a remarkable opinion — *Mabo v. Queensland* — which, while recognizing for the first time land claims of indigenous Australians, nevertheless limited those claims under a variation of the doctrine of discovery. There too, the discovering European sovereign was recognized to be the owner of the underlying title to indigenous lands. Professor Robertson does not, however, appear to question or challenge the claim that "discovery" resulted in indigenous nations and peoples "losing" "ownership of their lands". In the Canadian context, Thomas Issac's book *Aboriginal Law* lists *Johnson v. McIntosh* under the heading "Aboriginal Title" in the table of contents. In fact, the *Johnson* ruling is the second document in his book, after the 1763 British Royal Proclamation.

III. Global scope and history of the Doctrine of Discovery

5. What is now called "international law" was previously known as the Law of Nations.[4] In the late nineteenth century, for example, the international law scholar Thomas Erskine Holland referred to the law of nations as "the law of Christendom; as little applicable to infidels as was the 'common law' of the Greek cities ... to societies of barbarians".[5] In 1835, Judge John Catron (1786-1865), while seated on the Supreme Court of the State of Tennessee (United States),[6] officially identified "a principle" as part of "the law of Christendom", specifically, "that discovery gave title to assume sovereignty over, and to govern the unconverted [non-Christian] peoples of Africa, Asia, and North and South America". Catron declared that this principle had been recognized as a part of the Law of Nations "for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial".[7]

6. This preliminary study establishes that the terminology of early international law, such as "Christendom" and "every Christian power",[8] is in keeping with terminology found in key documents from the fifteenth and later centuries. The Doctrine of Discovery is more accurately termed the Doctrine of Christian Discovery.

7. Judge Catron's mention of "four centuries" prior to his era points back to the mid-fifteenth century, the time of numerous documents issued from the Vatican by

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[4] In an earlier era, "Law of Nations" was commonly used by international law commentators. Vattel provides an example: "In cases of doubt arising upon what is the Law of Nations, it is now an admitted rule among all European nations, that our common religion, Christianity, pointing out the principles of natural justice, should be equally appealed to and observed by all as an unfailing rule of construction" (Emmerich Vattel, *The Law of Nations*). Henry Wheaton provides a second case in point. In the preface to the third edition of his *Elements of International Law*, Wheaton wrote in 1845: "During the Middle Ages the Christian States of Europe began to unite and to acknowledge the obligation of an international law common to all who professed the same religious faith" and " ... The origin of the law of nations in modern Europe may thus be traced to two principle sources — the canon law and the Roman civil law". This preliminary study uses phrases such as "the Christian States of Europe", or "Christian nations of Europe" because they are in keeping with the actual terminology in use at the time of the development of the doctrine.

[5] Thomas Erskine Holland, *Studies in International Law* (Oxford: At the Clarendon Press, 1898).

[6] President Andrew Jackson appointed Judge Catron to the United States Supreme Court in March 1837. Thus, Catron, along with his influence and mindset, was moved to the highest court in the United States system.

[7] See footnote 1. Catron further declared the global scope of the Doctrine of Discovery and the Framework of Dominance: "That, from Cape Horn to Hudson Bay, it is the only known rule of sovereign power, by which the native Indian is coerced. Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land."

[8] "Christian powers" refers to what were once known as the States members of the "family of nations". International law scholar Thomas Erskine Holland is quoted in *Webster's New International Dictionary of the English Language* as saying that the term family of nations "may be said to include the Christian nations of Europe and their offshoots in America, with the addition of the Ottoman Empire, which was declared by the treaty of Paris of 1856 to be admitted to the 'concert Europeen'. Within this charmed circle, to which Japan also has now established her claim to be admitted, all states, according to the theory of international law are equal". The same volume provides the following definition: "Family of nations. The aggregate of states (orig. the Christian nations of Europe) which, as a result of their historical antecedents, have inherited a common civilization, and are at a similar level of moral and political opinion, or have been recognized by those states as on that level."

the Holy See, notably the papal bulls *Dum diversas* and *Romanus Pontifex*. Those decrees are part of the record of the genesis of competing claims by Christian monarchies and States in Europe to a right of conquest, sovereignty and dominance over non-Christian peoples, along with their lands, territories and resources, during the so-called Age of Discovery.[9]

8. In 1917, the Carnegie Institution published Frances Gardiner Davenport's *European Treaties Bearing on the History of the United States and Its Dependencies to 1648*, a work that provides insight into the semantics of so-called discovery, and an international Framework of Dominance to which indigenous peoples have been and are still being subjected, in violation of their individual and collective human rights.[10] As we shall demonstrate, the category "newly discovered lands" includes the lands of indigenous peoples categorized at that time by various Christian powers of Europe as non-Christians, for example, "heathens", "pagans", "gentiles" and "infidels".[11]

9. The papal bull *Romanus Pontifex*, issued in 1455, serves as a starting point to understand the Doctrine of Discovery, specifically, the historic efforts by Christian monarchies and States of Europe in the fifteenth and later centuries to assume and exert rights of conquest and dominance over non-Christian indigenous peoples in order to take over and profit from their lands and territories. The overall purpose of these efforts was to accumulate wealth by engaging in unlimited resource extraction, particularly mining, within the traditional territories of indigenous nations and peoples. The text of *Romanus Pontifex* is illustrative of the doctrine or right of discovery. Centuries of destruction and ethnocide resulted from the application of the Doctrine of Discovery and framework of dominance to indigenous peoples and to their lands, territories and resources.[12]

10. Written by Pietro da Noceto, private secretary and confidant of Pope Nicolas V, the decree *Romanus Pontifex* begins by saying that the document was issued for "a perpetual remembrance". It was to be remembered, in other words, in perpetuity.[13] The Roman pontiff was said to be empowered to ordain and dispose of "those things which he sees will be agreeable to the Divine Majesty and by which he may bring the sheep entrusted to him by God into the single divine fold, and may acquire for them the reward of eternal felicity, and obtain pardon for their souls". This language is suggestive of religious conversion, and the document goes on to reveal the Framework of Dominance to be applied to non-Christian lands previously unknown to Western Christendom.

11. That *Romanus Pontifex* constituted and projected into the world a Framework of Dominance, conversion and violence is revealed by terms such as "vanquish".

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[9] See Francis Gardiner Davenport, *European Treaties*. Quotations in paras. 8-17 below are from Davenport.

[10] The Doctrine of Discovery emerged out of an era when non-Christian peoples were not considered to be human. As Henry Wheaton stated in his *Elements of International Law*, "the heathen nations of the other [non-Christian] quarters of the globe were the lawful spoil and prey of their civilized conquerors".

[11] The terms "barbarians" and "savages" were also used. See also footnotes 3 and 7 above.

[12] For the purpose of this study, "ethnocide" includes the destructive consequences to peoples that follow from their removal from their traditional lands and territories, in violation of their human integrity and their human rights.

[13] The concept of "perpetual remembrance" coincides with the fact that Pope Nicholas V made his grant "forever".

The objectives of the Holy See and the Portuguese monarch were more likely to come to pass, said Pope Nicholas, "if we bestow suitable favours and special graces on those Catholic kings and princes, who ... restrain the excesses of the Saracens and of other infidel enemies of the Christian name [and] ... vanquish ... their kingdoms and habitations, though situated in the remotest parts unknown to us". The document praises vanquishing actions that "subject" non-Christians to the Catholic kings' and princes' "own temporal dominion, sparing no labour or expense". Thus, the Holy See decreed a vanquishing violence to achieve dominance and control, as lords, over non-Christian peoples, and possession of their lands, territories and resources.

12. *Romanus Pontifex* further demonstrates the Framework of Dominance with Pope Nicholas's mention of Prince Henry of Portugal as a "true soldier of Christ" who "would best perform his duty to God" if he "might ... be able ... to subdue certain gentile or pagan peoples ... and to preach and cause to be preached to them the unknown but most sacred name of Christ".[14] To endeavour to use violence and religious conversion to "subject" non-Christian peoples is to work towards their dominance and subjugation.

13. Portuguese ships, said the papal bull, had explored and taken possession of very many harbours, islands and seas, eventually arriving at "the province of Guinuea [sic]". As a result, the Portuguese had "taken possession of some islands and harbours and the sea adjacent to that province". Eventually, the Portuguese voyagers "came to the mouth of a certain great river commonly supposed to be the Nile". They then waged war "for some years against the [gentile or pagan] peoples of those parts in the name of the said King Alfonso and of the infante".

14. *Romanus Pontifex* further explains that as a result of years of war other islands in western Africa "were subdued and peacefully possessed" along "with the adjacent sea". King Alfonso and Prince Henry had explored, "acquired and possessed such harbours, islands, and seas ... as the true lords of them ..." and had "ordained that none ... should presume to sail to the said provinces or to trade in their ports or to fish in the sea" without their licence, permission and payment of tribute. With the Holy See's blessing and sanction, King Alfonso assumed a right of complete control as against "gentile or pagan" peoples, and over their lands, territories and resources. Such presumptions or claims by potentates, States, and their successors, of a right to "grant", "discover", "subdue", "acquire" and "possess" and permanently control non-Christian indigenous peoples, along with their lands, territories and resources, is what this preliminary study refers to as the Framework of Dominance.

15. Pope Nicholas authorized King Alfonso to assume and take control over non-Christian lands because the Holy See "had formerly ... [for example, in the bull

[14] That the term "subdue" invokes and carries the Framework of Dominance is revealed by its definition: "to conquer by force and by superior power and bring into subjection: vanquish, crush". "Subdued" is "brought under control by or as if by military force" (*Webster's Third New International Dictionary of the English Language Unabridged, 1993*). The one who subdues or who has subdued is the one who assumes a position of dominance. "Dominance" brings us to "dominant position in an order of forcefulness". And, finally, "dominant" brings us to "commanding, controlling, or having supremacy or ascendancy over all others by reason of superior strength or power". Thomas Hobbes, in *Leviathan*, declared that "Dominion acquired by conquest or victory in war, is that which some writers call *despotical*". He traces this to the Greek word signifying "a lord or master", and says despotic dominion is that "of the master over his servant".

Dum diversas of 1452] granted among other things free and ample faculty[15] to the aforesaid King Alfonso — to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and [the right] to convert them [those things] to his and their use and profit ...". This "faculty" granted by the Holy See to King Alfonso to "apply and appropriate to himself" the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods, is a papal licence for the forced taking of all indigenous lands and territories in the regions located, and to engage in unlimited resource extraction for the monarch's "use and profit". In this context, the secular meaning of "convert" is "to appropriate dishonestly or illegally" that which belongs to another".[16] To make the forced appropriation seem "lawful" and "right", Pope Nicholas declared that because the Apostolic See had previously issued the "faculty" to engage in such work, and because the king had thereby "secured the said faculty", "the said King Alfonso ... justly and lawfully has acquired and possessed, and doth possess, these islands, lands, harbours, and seas, and they do of right belong to ... the said King Alfonso and his successors ...".

16. Thus, *Romanus Pontifex* clearly illustrates the pattern of contemporary claims by States to rights of conquest and dominance with regard to indigenous peoples, their lands, territories and natural resources. It is for this reason that the papal bull *Romanus Pontifex* serves as a powerful template illustrative of the Framework of Dominance that lies at the root of the violations of indigenous peoples' human rights, both individual and collective.

17. As noted, the "right of conquest" granted by Pope Nicholas in *Romanus Pontifex* is made forever: "And by force of those and the present letters [papal bulls] of faculty the acquisitions already made, and what hereafter shall happen to be acquired ... forever of right do belong and pertain, to the aforesaid king and his successors and to the infante, and that the right of conquest ... has belonged and pertained, and forever of right belongs and pertains, to the said King Alfonso, his successors, and the infante, and not to any others". Mention of King Alfonso's "successors" refers to rights of conquest and dominance being transferable by treaty between the States of Europe, otherwise known as the "family of nations". Many

[15] In this context the word "faculty" means "ability to act or do". Thus, Pope Nicholas said that the Holy See, by its previous authorization, had granted to King Alfonso the ability to "invade, search out [and] vanquish".

[16] *Webster's Third New International Dictionary*. To invade and purport to convert the lands of other peoples is to engage in an act or acts of "conversion". Black's Law Dictionary (Fifth ed.) provides the following definition of "conversion": "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Any unauthorized act which deprives an owner of his property permanently or for an indefinite time. Unauthorized and wrongful exercise of dominion and control over another's personal property, to the exclusion of or inconsistent with rights of owner". From an indigenous peoples' perspective the assumptions and acts of Christian European powers to "invade, capture, vanquish, and subdue them" and to take away all their goods "both movable and immovable" were unauthorized and wrongful under indigenous systems of law and inconsistent with the inherent and original rights of the owners.

modern States of the world are the political successors of such claimed rights of conquest and dominance based on the Doctrine of Discovery.

IV. The Framework of Dominance

18. The bull *Romanus Pontifex* — along with all other such Vatican documents and royal charters — provides evidence of the Doctrine of Discovery used by the Christian States of Europe and their successors in the Americas and elsewhere to promote on a global scale a framework of dominance and the theft of indigenous peoples' lands, territories, and resources, under the disguise of activities that are deemed "just" and "lawful". The dominance framework was acknowledged in a working definition of "indigenous peoples" set out in the early 1970s:

> Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons or a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant.[17]

19. Another example will further illustrate this point. In 1995, the Office of the United Nations High Commissioner for Human Rights issued a fact sheet, in the introduction to which we find: "Indigenous or aboriginal peoples are so called because they were living on their lands before settlers came from elsewhere".[18] The phrase "before settlers came" is an acknowledgment that indigenous peoples were originally living on their own lands when other people arrived and claimed to be "dominant through conquest, occupation, settlement, or other means". The fact sheet also refers to the "settlers" as "the new arrivals" who became "dominant" through "conquest, occupation, settlement or other means". This mention of "dominant" and "conquest" acknowledges a history of invasion and forced imposition.

20. Elsewhere, the fact sheet again recognizes claims of dominance and the taking of indigenous lands by force: "Throughout human history, whenever dominant neighbouring peoples have expanded their territories or settlers from far away have acquired new lands by force, the cultures and livelihoods — even the existence — of indigenous peoples have been endangered". Referring to non-indigenous peoples being "dominant" over indigenous peoples, and to "settlers" acquiring indigenous lands "by force" pinpoints what has resulted in the cultures and livelihoods — even the existence of indigenous peoples being endangered. Issues of ethnocide[19] and

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[17] See Patrick Thornberry, *Human Rights and Indigenous Peoples* (Manchester University Press, 2002). See also the preliminary report of the Special Rapporteur of the Commission on Human Rights, José Martínez Cobo, of 29 June 1972 (E/CN.4/Sub.2/L.566).

[18] Fact Sheet No. 9 (Rev. 1), entitled "The Rights of Indigenous Peoples", relating to the Programme of Activities for the International Decade of the World's Indigenous People (1995-2004) (General Assembly resolution 50/157, annex).

[19] See footnote 12 above.

linguicide[20] are included in the reference to the existence of indigenous peoples being endangered by those monarchies and States claiming "effective dominance" over them, their lands, and territories, in violation of indigenous peoples' individual and collective human rights.

21. The Special Rapporteur of the Commission on Human Rights, José Martinez Cobo, in his final report on the problem of discrimination against indigenous populations, employed key concepts that identify and acknowledge dominance as the context of indigenous peoples' issues:

> Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[21]

22. In the above working definition we find the same conceptual pattern mentioned previously. The term "pre-invasion" acknowledges the invasion of indigenous peoples' territories. "Pre-colonial" acknowledges the patterns of colonialism and colonization that have had a negative impact on indigenous peoples, their lands, territories and resources. The statement "societies now prevailing on those [indigenous] territories" views non-indigenous societies as presuming to have a "superior force or influence" over indigenous peoples and their territories. Finally, referring to indigenous peoples as "non-dominant" acknowledges the fact that invading societies claim dominance over indigenous peoples in violation of their individual and collective human rights.

V. The Doctrine of Discovery and the United States of America

23. In this section we shall focus in detail on United States federal Indian law as a prototypical example of the application of the Doctrine of Discovery and the Framework of Dominance to indigenous nations and peoples. This information will illustrate the extent to which national laws, particularly property laws, regarding indigenous peoples, have rested and continue to rest on the Doctrine of Discovery and the Framework of Dominance.[22]

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[20] As used in this preliminary study, "linguicide" refers to the history of laws and policies implemented in an effort to destroy the languages of indigenous peoples.

[21] "Study on the problem of discrimination against indigenous populations" (E/CN.4/Sub.2/476 and addenda; E/CN.4/Sub.2/1982/2 and addenda; E/CN.4/Sub.2/1983/21 and addenda; available from www.un.org/esa/socdev/unpfii/en/spdaip.html).

[22] In United States federal Indian law the Framework of Dominance is commonly referred to as "the plenary power doctrine". Within the United States Constitution, the regulation of Government relations with American Indians falls exclusively to the federal Government, and not to the state Governments. The authority of Congress to pass legislation dealing with American Indian affairs is often called "the plenary power of Congress". This leads to the common expression "Congress has plenary power over Indian affairs". The Framework of Dominance is expressed through the statement "Congress has plenary power over Indian nations or tribes" (see Wilkins, *American Indian Sovereignty*).

24. The United States federal Indian law system comprises thousands of statutes, a voluminous body of case law, hundreds of treaties, both ratified and unratified, and more than 200 years of federal Indian policy development.[23] This preliminary study of the Doctrine of Discovery, however, will remain narrowly focused on the conceptual starting point or premise of that overall system as embodied in the United States Supreme Court ruling *Johnson v. McIntosh*.[24]

25. The premise of the federal Indian law system has become even more problematic in recent years because of recently disclosed evidence of fraud in the *Johnson* case. The case was feigned; it was the result of an act of collusion between the two parties, "for effect".[25] In 1774 and 1775, respectively, the Illinois and Wabash Land Companies purchased lands directly from the Illinois and Piankeshaw Indian nations in violation of a bar the British crown had placed on such land purchases by the Royal Proclamation of 1763. The two land purchases were made from the two free and independent Indian nations just prior to the Declaration of Independence and the Revolutionary War between the newly declared United States and Great Britain. Nearly 50 years after those land purchases, two relatives and heirs of Thomas Johnson, one of the original investors in the land purchases, filed suit in United States District Court for the District of Illinois. The attorneys for the plaintiffs had gone in search of a defendant, whom they found in the person of William McIntosh. The attorneys for the plaintiffs hired the attorneys for the defendant, Mr. McIntosh.[26]

26. In addition, Chief Justice John Marshall (1755-1835) had large real estate holdings (as did his family and friends) that would have been affected if the case had been decided contrary to those interests.[27] Rather than remove himself from the case, however, the Chief Justice wrote the decision for a unanimous United States Supreme Court.[28]

27. The newly formed United States needed to manufacture an American Indian political identity and concept of Indian land title that would open the way for the United States in its westward colonial expansion. The principle that the United

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[23] See generally Felix Cohen, *Handbook of Federal Indian Law*.

[24] The beginning of United States federal Indian case law is commonly known as the Marshall Trilogy, which consists of three Supreme Court rulings handed down under the leadership of Chief Justice John Marshall: *Johnson's Lessee v. McIntosh* 8 Wheat. 543 (1823); *Cherokee Nation v. Georgia* 30 U.S. 1 (1831); and *Worcester v. Georgia* 31 U.S. 515 (1832). A discussion of all three cases is beyond the scope of this preliminary study. However, for now it is important to note that in *Worcester v. Georgia*, Chief Justice Marshall modified the view he had expressed in the *Johnson* ruling, as it applied to individual States of the United States. In *Worcester*, for instance, Marshall said that the Doctrine of Discovery could not "annul the previous rights of those who had not agreed to it". In other words, "discovery" could not cause Indian rights to cease to exist. The principle of discovery, Marshall further declared, "could not affect the rights of those already in possession" of the land. Space does not permit a discussion of the implications of these statements. In any case it is the *Johnson* ruling rather than *Worcester* that has been repeatedly characterized as conceptually laying down the foundation of Indian title in the United States of America.

[25] Lindsay Robertson, *Conquest by Law*. The phrase "for effect" refers to an act of collusion by two parties to have a particular effect on a court. The two sides were only pretending to have a dispute in order to get the case before the United States court system.

[26] Robertson, *Conquest by Law*.

[27] Ibid.

[28] Peter d'Errico, "John Marshall: Indian Lover?".

States Supreme Court devised for this purpose in the *Johnson* ruling was "that discovery gave title to the government, by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession".[29] Based on the concept of "discovery", the Supreme Court constructed an Indian title of "mere occupancy". In keeping with this concept, it has often been argued that the Indian title of "occupancy" is merely a temporary right, inferior and subject to the absolute title and ultimate dominion of early Christian European powers, and later State actors such as the United States.[30]

28. To illustrate the origin of the "principle" of "discovery", Marshall examined the language of the John Cabot charter and a number of other royal charters issued by the British crown:

> No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.[29]

29. The above quoted language from King Henry VII's charter to John Cabot and his sons traces directly back to the long tradition of the Vatican papal bulls mentioned above. With that language, the British crown was acting on the view that previous papal grants to Portugal and Spain could not rightfully bar the British crown from voyaging and appropriating lands of "the heathen and infidel" which before this time "have been unknown to all Christian people". The *Johnson* ruling continues by saying that the Cabot charter constitutes "a complete recognition" of the "principle" or doctrine of discovery:

> In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle [of discovery] which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people"; and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.[29]

30. The Supreme Court's language once again invokes the Framework of Dominance. Earlier in the *Johnson* decision Marshall also identified that same framework through his use of the concept "dominion":

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been

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[29] *Johnson v. McIntosh* at 576.

[30] This concept was referenced in the United States legal brief in *Tee-Hit-Ton* when the United States attorneys argued that "a right of occupancy in the Indians" was "retained by the Indians only by the grace of the sovereign". See paras. 41-49 below.

understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[31]

31. As the United States Supreme Court viewed the matter in *Johnson*, the English royal charters expressed the doctrine that "Christian people", on the basis of a claim of "discovery", had asserted a right to take possession of any lands inhabited by "natives, who were heathens", meaning non-Christians. The Political philosopher Thomas Hobbes stated that "the right of possession is called Dominion".[32] Thus, asserting "a right to take possession" is simply another way of saying "asserting a right of dominion" or dominance.[33]

32. In the *Johnson v. McIntosh* ruling, the United States Supreme Court claimed that the original rights of American Indians "to complete sovereignty, as independent nations" had been "necessarily diminished" by the right of discovery. This "right" of "discovery", said the Court, was confined to countries "unknown to Christian people". The Supreme Court claimed, in other words, that Christian people locating lands in the Americas that until then had been "unknown to Christian people" had ended the right of American Indian nations to be free and independent. On the basis of the above language, the United States Supreme Court used the Doctrine of Discovery to prevent the application of the first principle of international law to American Indian nations and their traditional territories: "The authority of a nation within its own territory is absolute and exclusive".[34] To give themselves unfettered access to the lands, territories and resources of indigenous peoples, the Christian States of Europe and later State actors considered this principle applicable only to themselves.

33. No one could sensibly argue against the idea that the existence of American Indian nations and peoples was originally free of the Doctrine of Discovery and Christian European claims and assertions of dominance.[35] Justice Joseph Story (1779-1845) revealed the argument against that original free existence when he wrote "As infidels, heathens, and savages", the Indians "were not allowed to possess the prerogatives belonging to completely sovereign independent nations".[36] Once the concepts of "discovery" and "ultimate dominion" (traced back to papal bulls such as *Romanus Pontifex*) were institutionalized in United States law and policy, this resulted in the imposition of a Framework of Dominance over indigenous nations and peoples. This enabled the United States Government to appropriate and grant away Indian lands, territories and resources, with impunity, in violation of indigenous peoples' individual and collective human rights.

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[31] *Johnson v. McIntosh* at 574.

[32] Thomas Hobbes, *Leviathan*, chap. XVI.

[33] The United States usage of "ultimate dominion" and "right of possession" as property law concepts brings the discussion back to William Brandon's etymology of *dominium*: "unrestricted power, absolute dominium, lordship, tyranny, despotism. Political power grown from property — dominium — was, in effect, domination" (see footnote 2 above).

[34] Francis Wharton, *A Digest of International Law of the United States*, vol. I.

[35] Spanish theologian Francisco Vitoria is considered by many to be the "father" of international law. During his lectures at the University of Salamanca he examined the issue of "title by discovery". Not much needed to be said about that form of title, he concluded, because "the barbarians were the true owners [of their lands], both from the public and private standpoint". The adherents and proponents of the Doctrine of Discovery and the Framework of Dominance have ignored Vitoria's powerful analysis on this point. James Brown Scott, *The Catholic Conception of International Law*.

[36] Joseph Story, *Commentaries on the Constitution of the United States*.

VI. *Terra nullius*, *terra nullus* and the *Johnson v. McIntosh* ruling

34. There are two terms that have been used against indigenous peoples historically, both of which mean "devoid of human beings". The two terms have resulted in the dehumanization of indigenous peoples. The first of these terms is *terra nullius*, a category applied by Roman lawyers to enemy lands and places such as desert islands.[37] The second term is *terra nullus*, which, according to Francis Lieber, the first American political scientist, was based on the fact that the original indigenous inhabitants of a geographical area during the so-called Age of Discovery were not baptized as Christians.

35. Francis Lieber (1800-1872) was a German-American who emigrated to the United States in 1827 and became one of the foremost political scholars of the nineteenth century.[38] Lieber identified the doctrine of *terra nullus*, which referred to a land inhabited by heathens, pagans, infidels or unbaptized persons, whom Christians treated in a fundamental sense as not existing. The concept of *terra nullus* led to the view that lands inhabited by non-Christians were vacant or "unoccupied lands" and therefore open to a right of possession by Christians. "Paganism", wrote Lieber, which meant being unbaptized, "deprived the individual [non-Christian] of those rights which a true ... morality considers inherent in each human being".

36. In an 1888 essay, Burke Aaron Hinsdale (1837-1900) documented that the Right of Discovery was founded "on the principle that what belongs to no one [may] be appropriated by the finder". Following Lieber's thinking, Hinsdale noted that the argument became effective only when supplemented by the Church definition of *nullius*. The Church definition, said Hinsdale, "supplied the necessary premise". "Grant that res nullius is the property of the finder; that an infidel is nullius [non-existing]; that the American [Indian] savage is an infidel [nullius, or non-existing] and the argument is complete". Hinsdale said that this argument, premised on the unbaptized status of the original inhabitants of "discovered" lands, was "the *origin* of the Right of Discovery, the criterion to which the nations that divided the New World appealed in territorial controversies, and the ultimate ground of title throughout the United States". Here Hinsdale referenced the *Johnson v. McIntosh* ruling. Hinsdale said that the Right of Discovery formed "the ultimate ground of title throughout the United States".[39]

37. United States Supreme Court Justice Joseph Story was a contemporary of Francis Lieber. For a time, the two men moved in the same intellectual circles, and Story contributed more than 120 pages to Lieber's *Encyclopaedia Americana*.[40] Justice Joseph Story also helped to decide the 1823 *Johnson v. McIntosh* case. One decade after the *Johnson* decision, in 1833, Story published his *Commentaries on the Constitution of the United States*, in which he examined the "origin and title to

[37] Steven T. Newcomb, *Pagans in the Promised Land*. Quotations in paras. 35 and 36 are from Newcomb unless otherwise identified.

[38] Francis Lieber is credited with first conceiving the Institut de droit international. He became an adviser to President Abraham Lincoln during the American Civil War, and worked with the Union War Department and President Lincoln to draft legal guidelines for the Union Army. His code, known as the Lieber Code, was eventually adopted by other military organizations in the world and went on to become the basis of the laws of war.

[39] B. A. Hinsdale, "The Right of Discovery".

[40] Story contributed unsigned works on natural law, American and English law to Lieber's *Encyclopaedia*.

the territory of the colonies", and wrote the following regarding the origin of European title in the Americas and the *Inter Caetera* papal bull of the fifteenth century:

> ... The Indians were a savage race, sunk in the depths of ignorance and heathenism. If they might not be extirpated for their want of religion and just morals, they might be reclaimed from their errors. They were bound to yield to the superior genius of Europe, and in exchanging their wild and debasing habits for civilization and Christianity they were deemed to gain more than an equivalent for every sacrifice and suffering. The Papal authority, too, was brought in aid of these great designs; and for the purpose of overthrowing heathenism, and propagating the Catholic religion, Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.[41]
>
> 6. The principle, then, *that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments*,[42] being once established, it followed almost as a matter of course, that every government within the limits of its discoveries excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives.[43] (emphasis added)

38. In the two paragraphs quoted above, Story made a direct connection between the *Inter Caetera* papal bull of 1493 and the right of discovery expressed in the *Johnson* decision.[44] Story thereby placed the *Johnson v. McIntosh* ruling — the starting point of United States federal Indian case law — not only in the context of the decree *Inter Caetera*, but in the larger context of the numerous Vatican documents issued to the Portuguese and Spanish crowns during the so-called Age of Discovery, including the framework of dominance found in the papal bulls *Dum diversas* and *Romanus Pontifex*.

39. On the basis of *terra nullus* and the Doctrine of Discovery, the United States Supreme Court stated in the *Johnson* decision that the [British] crown, had made

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[41] In a footnote Story wrote: "'*Ut fides Catholica, et Christiana Religio nostris praesertim temporibus exaltetur, &c., ac barbarae nationes deprimantur, et ad fidem ipsam reducantur,*' is the language of the Bull. 1 Haz. Coll. 3". The Latin translates: "Among other works well pleasing to the Divine Majesty and cherished of our heart, this assuredly ranks highest, that in our times especially the Catholic faith and Christian religion be exalted and everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself" (Davenport). The Latin *deprimantur* translates to both "overthrown" and "subjugated", thereby invoking the Framework of Dominance.

[42] The highlighted words are taken, verbatim and without quotation marks, directly from *Johnson v. McIntosh*.

[43] Here Story cited volume 3 of Chief Justice John Marshall's *A History of the Colonies* (3 Marshall, Hist. Col. 13, 14). Marshall's *History* was published in 1824 within months of the *Johnson v. McIntosh* ruling.

[44] That Story's citation of the 1493 papal bull was reflective of the framework of dominance is evident from the Latin text that he quoted from a papal bull issued by Pope Alexander VI. The pope, for example, called for non-Christian nations -- "barbarous nations" — to be "subjugated" and for the "propagation of the Christian empire" (Davenport). Additionally, the Holy See declared in the *Inter Caetera* bull, "We trust in Him from whom empires, governments, and all good things proceed" (Ibid.). That this sentence is consistent with the framework of dominance is revealed by the Latin translation of "governments" which is "*dominationes*".

"no distinction ... between vacant lands and lands occupied by Indians".[45] The Supreme Court claimed, in other words, that the British crown treated American Indian lands as if they were vacant lands. In *The International Law of John Marshall*, Benjamin Munn Ziegler explained the Court's statement about vacant lands as follows: "[o]ne of the oldest means by which nations have acquired territory has been through the discovery of previously unoccupied lands". In an explanatory note, Ziegler further said: "The term 'unoccupied lands' refers of course to lands in America which when discovered were 'occupied by Indians' but 'unoccupied by Christians'".[46]

40. George Grafton Wilson (1863-1951), a professor in the United States at Brown University, Harvard University, the Fletcher School of Law and Diplomacy, and the United States Naval War College, expressed the same point. On the basis of the *Johnson v. McIntosh* ruling, Wilson stated that "England, France, Holland, Portugal, and Spain alike maintained that discovery of lands previously unknown to Christian people gave the Christian discoverer the right to take possession".[47]

VII. The Doctrine of Discovery in contemporary times

41. In the mid-twentieth century, the United States Supreme Court reaffirmed and embraced the Doctrine of Discovery. Five hundred years after the issuance of Romanus Pontifex, the United States Supreme Court handed down its decision in *Tee-Hit-Ton Indians v. The United States*.[48] The case had to do with the Tee-Hit-Ton people whose language is Tlingit, and whose "customs, laws, and traditions [are] similar to other Tlingit peoples" in what is now called Alaska.[49] In 1947, the United States Congress authorized the United States Secretary of Agriculture to sell the timber of the Tongass National Forest, a national forest that the Congress had established in an area that partly encompassed the traditional territory of the Tee-Hit-Ton and the Tlingit. On 20 August 1951, the United States Forest Service sold Ketchikan Pulp and Paper Company "the right to all harvestable in the Tongass National Forest, estimated at 1,500,000 cubic feet". Shortly thereafter, the Tee-Hit-Ton sued, arguing that they "were the sole owners of the land and water in dispute; that they had never sold or conveyed the land to any other party; and they asked for a judgment for the losses and damages from the Tongass taking, plus interest".[50]

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[45] *Johnson v. McIntosh* at 596. The quotation from Story in para. 37 above links to the doctrine of *terra nullius*.

[46] Benjamin Munn Ziegler, *The International Law of John Marshall*.

[47] George Grafton Wilson, "International Law and the Constitution", 13 B.U. L. Rev. 234 (1933). Wilson's statement "that discovery of lands previously unknown to Christian people gave the Christian discoverer the right to take possession" is in keeping with Thomas Hobbes's statement, already mentioned, that "the right of possession is called Dominion". In other words, "dominance".

[48] *Tee-Hit-Ton Indians v. The United States* 348 U.S. 272 (1955).

[49] David Wilkins, *American Indian Sovereignty and the U.S. Supreme Court*: "The area claimed by the Tee-Hit-Ton entailed approximately 357,802 acres of land and 150 square miles of water. They had inhabited the region for thousands of years, and the area in question was recognized as theirs by neighboring tribes". The traditional territory of the Tlingit exists within the temperate rainforest of the south-east Alaska coast and the Alexander Archipelago. The Inland Tlingit inhabit the far north-western part of what is now known as the province of British Columbia and the southern Yukon Territory of Canada.

[50] Wilkins, *American Indian Sovereignty*.

42. Eventually, United States government attorneys filed a brief with the Supreme Court that was based in part on the Doctrine of Discovery and the era of the Vatican papal bulls; in it they argued that it was a well-recognized principle in international law that "the lands of heathens and infidels" were open to acquisition (taking) by "Christian nations".[51] A few comments will place the United States legal argument about "Christian nations" in context: until 1856, there existed a collective international political identity, comprising different monarchies and States, called variously by such names as "Christendom", "the Christian common wealth" and "the Family of Nations" ("the Christian nations of Europe and their offshoots in America"). In keeping with this history, the United States attorneys began their "summary of argument" with the *Johnson* decision: "It is a well established principle of international law that with respect to the lands of this continent discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession (*Johnson v. McIntosh*, 8 Wheat. 543, 573)". The attorneys continued: "... the discovering nations asserted in themselves, by virtue of the principle of discovery, the complete and exclusive title to the land — subject only to a right of occupancy in the Indians, such right being retained by the Indians only by the grace of the sovereign".[51]

43. Under the heading "Argument" the United States attorneys referred back to the centuries-long era of "the Christian nations of Europe." They included a discussion of the era of the papal bull Romanus Pontifex: "Prior to the great era of discovery beginning in the latter part of the fifteenth century, the Christian nations of Europe acquired jurisdiction over newly discovered lands by virtue of grants from the Popes, who claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidels."[52]

44. The attorneys continued with the following line of argument in *Tee-Hit-Ton* based on the Vatican papal bulls:

> For example, in 1344, Clement VI had granted the Canary Islands to Louis of Spain upon his promise to lead the islanders to the worship of Christ, and, following the discovery of the New World by Columbus, Alexander VI in 1493 and 1494 issued bulls granting to Spain all lands not under Christian rule west of a line 100 leagues west of the Azores and Cape Verde Islands. ... The latter papal grant, because of the breaking down of the papal authority and the vastness of the territory covered, was not accepted by the other nations or even greatly relied upon by Spain, and it was necessary for the civilized, Christian nations of Europe to develop a new principle which all could acknowledge as the law by which they should regulate, as between themselves, the right of acquisition of territory in the New World, which they had found to be inhabited by Indians who were heathens and uncivilized according to European standards.[51]

45. Justice Stanley Forman Reed delivered the majority decision for the United States Supreme Court in *Tee-Hit-Ton Indians v. The United States*. However, before explaining the Court's ruling in *Tee-Hit-Ton*, it is necessary to first mention the 1946

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[51] Brief for the United States in *Tee-Hit-Ton Indians v. The United States*.

[52] Here the United States attorneys cited Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926).

Supreme Court case *Alcea Band of Tillamooks v. The United States*.[53] In the *Alcea Band* case, the majority of the Supreme Court decided that the Alcea Band of Tillamook Indians in Oregon were entitled to monetary compensation for a taking of their ancestral lands by the United States Government. However, Justice Reed, who wrote the minority opinion, disagreed. Justice Reed relied on the *Johnson v. McIntosh* ruling of 1823 to make his argument that the Alcea Band of Tillamook Indians were not entitled to monetary compensation for a taking of their ancestral lands by the United States Government.

46. As the main support for his argument in the *Alcea Band* case, Justice Reed characterized the *Johnson v. McIntosh* ruling as having advanced the theory that the "discovery" of Indian lands "by Christian nations gave them sovereignty over and title to the lands discovered". This, of course, matches Judge Catron's claim in *State v. Foreman* that it was "the law of Christendom that discovery gave title to assume sovereignty over, and to govern the unconverted natives".[54]

47. When Justice Reed wrote the majority opinion for the United States Supreme Court in *Tee-Hit-Ton*, he concurred with the argument made by the United States attorneys. He also applied the same line of reasoning regarding the Doctrine of Discovery that he had previously expressed in *Alcea Band of Tillamooks*. He said that it was "well settled" that American Indians held claim to lands in North America "after the coming of the white man, under what is sometimes termed Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants". He further said that "this right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians". Mention of "conquest" references the Framework of Dominance, and Justice Reed went on to say: "This position of the Indians has long been rationalized under the theory that discovery and conquest give the conquerors sovereignty over and ownership of the lands thus obtained".[55]

48. In his *Elements of International Law*, under "Rights of Property", Henry Wheaton wrote the following which, based on Justice Reed's citation, reveals the context of the United States Supreme Court's ruling in *Tee-Hit-Ton*:

> The Spaniards and the Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the

[53] 329 U.S. 40 (1946).

[54] See footnote 1 above.

[55] Justice Reed referred to *Johnson v. McIntosh* and to Henry Wheaton's *Elements of International Law*. Henry Wheaton (1785-1848) was an American lawyer and diplomat. He was the reporter of decisions for the United States Supreme Court when it made the *Johnson v. McIntosh* decision. He published the first edition of his *Elements of International Law* in 1836. Justice Stanley Reed, in the *Tee-Hit-Ton* decision, cited chapter V of Wheaton's *Elements*. However, there is nothing in chapter V that would be of relevance to the issue in *Tee-Hit-Ton*. It is in chapter IV, section 5, of *Elements* that Wheaton dealt with historical information about rights of property in international law. In that discussion, Wheaton covered the *Johnson v. McIntosh* ruling, the papal bull of 1493, the royal charters of England, and the doctrine or right of discovery. He also italicized the word "Christian" in the same manner that Chief Justice Marshall had italicized "Christian people" in the *Johnson* ruling. See Newcomb, *Pagans in the Promised Land*.

> fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims ... Thus the bull of Pope Alexander VI reserved from the grant to Spain all lands, which had been previously occupied by any other *Christian* [original emphasis] nation; and the patent granted by Henry VII of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels"; and "to subdue, occupy, and possess these territories, as his vassals and lieutenants". In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties". It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverers, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives.[56]

49. That the Doctrine of Discovery is still being used as an active legal principle by the United States Supreme Court in the twentieth-first century is revealed in the case *City of Sherrill v. Oneida Indian Nation of New York*[57] decided in March 2005, exactly 50 years after the *Tee-Hit-Ton* ruling. The case involved a dispute over taxation of ancestral lands of the Oneida Indian Nation. During oral arguments, it became clear that the case would hinge on whether, in the opinion of the Court, the Oneida Indian Nation "has sovereignty status" with regard to the ancestral lands the Oneida Nation had reacquired. To contextualize the Court's decision and to decide the sovereign status of the Oneida Indian Nation, the Supreme Court relied upon the Doctrine of Discovery. This is revealed in footnote number one of Justice Ruth Bader Ginsberg's decision for the Court majority: "Under the 'Doctrine of Discovery'", wrote Justice Ginsberg, "... fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original states and the United States". As documented by this preliminary study, the Supreme Court's reference to the Doctrine of Discovery places the context for the Court's decision in *Sherrill v. Oneida Indian Nation of New York* within the Framework of Dominance, dating back to the era of the Vatican papal bulls.

VIII. Conclusion

50. This preliminary study has documented that for more than 500 years the Doctrine of Discovery has been global in scope and application. At least two Governments other than the United States, Canada and Australia, have cited the *Johnson v. McIntosh* ruling to enforce the Doctrine of Discovery. When they have done so they have cited the Doctrine of Discovery and the Framework of Dominance. Non-indigenous legal scholars and State actors have interwoven the Doctrine of Discovery into international and domestic law. Within the context of the

[56] Wheaton, *Elements of International Law*, 3d ed.

[57] *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478, 148384 (2005).

United States, such persons include Chief Justice John Marshall, Justice Joseph Story, Henry Wheaton, Justice John Catron, Francis Lieber, B. A. Hinsdale, Alpheus Snow, George Grafton Wilson, Justice Stanley Reed, the United States attorneys who wrote the legal brief filed for *Tee-Hit-Ton Indians v. The United States*, and Justice Ruth Bader Ginsberg. They all relied upon the Doctrine of Discovery that, as this preliminary study has demonstrated, is rooted in and perpetuates the Framework of Dominance passed down, from generation to generation, from the era of Christendom and the Vatican papal bulls.[58]

IX. Recommendation

51. The information and material presented in this preliminary study of the international construct known as the Doctrine of Discovery indicates the need for further study and review, and for a more comprehensive assessment and exploration of issues raised here on the violations of indigenous peoples' inherent rights, particularly as recognized in the United Nations Declaration on the Rights of Indigenous Peoples. Therefore, we recommend that an international expert group meeting be convened to discuss in detail the findings and implications of this preliminary study of the Doctrine of Discovery and to present its findings to the Permanent Forum on Indigenous Issues at its annual session.

[58] Justice Joseph Story, in particular, was specific in his use of concepts that invoke the Framework of Dominance. He said, for example, that "the European discoverers claimed and exercised the right to grant the soil, while yet in possession of the natives, subject however to their right of occupancy; and the title so granted was universally admitted [by the European discoverers] to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treatises of public law, it was a transfer of *plenum et utile dominium*". This, then, takes us back to the etymology of such terms as discussed in footnote 2 above. Story's use of the secular term "European discoverers" is explained by Lindley in *The Acquisition and Government of Backward Territories*: "Later on the distinction was drawn between lands already occupied by Europeans and lands not so occupied, although in effect this was the same as the earlier distinction between Christian and non-Christian lands."

Annex

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